Supreme Court, U. S.
FILED
NOV 5 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

Brief of the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee in Opposition to the Petition For A Writ of Certiorari

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November 2, 1979

INDEX

	Page
Question Presented	1
Statement of the Case	1
Reasons Why That Portion Of The Judgment And Opinion Of The Court Of Appeals Which Reverses The District Court Should Not Be Reviewed By This Court	2
A. The Determination Of The Court Of Appeals Which Illinois Seeks To Have Reviewed Is Purely And Simply A Determination That The Evidence Presented Did Not Sustain The District Court's Order	2
B. Illinois Really Seeks To Try Again After Failing In Its Proof	9
C. Federal Law, Not State Law, Applies To This Case	10
Conclusion	12

CITATIONS

Page

CASES:

Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) 11

Cordova v. Fox, 351 F.2d 269 (10th Cir. 1965) 9

DeMarco v. United States, 415 U.S. 449 (1974) 9

Illinois v. Milwaukee, 406 U.S. 91 (1972) 10,11

Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) 9

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 11

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) 10

MISCELLANEOUS:

Ill. EPA, *Petition for Amendments to the Water Pollution Control Regulations of the Illinois Pollution Control Board*, Illinois Pollution Control Board Docket R77-12 (May 10, 1977) 6

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QUESTION PRESENTED

Should this Court grant certiorari with respect to that portion of the Court of Appeals' decision which determined that the evidence presented by the petitioners did not sustain certain relief provisions of the District Court's Judgment Order?

STATEMENT OF THE CASE

This Court is of course aware that the respondents herein have themselves petitioned this Court for a Writ of Certiorari

with respect to certain portions of the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit in this proceeding. *See* Case No. 79-408. Thus, the respondents do not maintain that the granting of a petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit would be inappropriate. However, the respondents do maintain that the criteria by which this Court determines whether to grant or not to grant a petition for certiorari require denial with respect to that portion of the Judgment and Opinion of the Court of Appeals to which Illinois' petition for Writ of Certiorari relates. As this responsive brief will show, the portion of the Court of Appeals Opinion and Judgment which Illinois seeks to have reviewed relates purely and simply to a determination by that court that Illinois had failed to meet the burden of proof imposed upon it by law in respect thereof and that the evidence in the record did not sustain that part of the District Court's Order. None of the criteria set forth in Rule 19 of this Court's Rules for granting the writ are present on the matters complained of by Illinois.

REASONS WHY THAT PORTION OF THE JUDGMENT AND OPINION OF THE COURT OF APPEALS WHICH REVERSES THE DISTRICT COURT SHOULD NOT BE REVIEWED BY THIS COURT

A. The Determination Of The Court Of Appeals Which Illinois Seeks To Have Reviewed Is Purely And Simply A Determination That The Evidence Presented Did Not Sustain The District Court's Order.

The trial in this action spanned six months and produced 14,000 pages of transcript and hundreds of exhibits. More than 400 pages of briefs and memoranda directed to the precise delineation of evidence relied upon were filed in the Court of Appeals. That court considered the matter for more than seven months prior to its decision of April 26, 1979. The result was a determination by the Court of Appeals that:

> "We are unable to conclude, after a careful examination of the evidence *cited by plaintiffs* to justify the limitations imposed, that this evidence was sufficient." App. A-42. (Emphasis added)[1]

The Illinois petition sets up a series of "straw men" and then knocks them down. One "straw man" is the claim that the Court of Appeals has acted on an erroneous extra-record presumption relating to the effluent limitations established by the EPA and the DNR. To knock it down Illinois presents an extensive argument directed *not to what the Court of Appeals determined* (that there was no evidence on the point) but rather to a presumption of the legitimacy of administrative conduct that the Court of Appeals noted, in passing, should be accorded to effluent limitations established by (a) the EPA, (b) the permit authority having the duty to protect residents in the immediate environs of the discharge, and (c) by the complaining state itself (App. A-45).

The Court of Appeals decision with respect to effluent limitations holds simply that Illinois had failed to meet the burden of proof imposed upon it by law. The court's decision is nothing more and nothing less than a judicial determination that the evidence submitted by Illinois in the court below failed to support the trial court's determination with respect to effluent limitations. True the court did say, as the fact is, that the state permit authority had "the duty of protecting residents in the immediate environs of the discharges" and that this was done "by experts who were presumably as dedicated to the protection of public health and the environment as those on whose conclusions plaintiffs rely." (App. A-45) But, the court's holding is that there was no evidence to sustain the effluent limitations imposed by the trial court. The court did not base its holding on the presumed dedication of the state officials.

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[1] Appendix references herein are to the "Appendices to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" filed by respondents in Case No. 79-408.

A second fallacious position presented in the Illinois petition, which again is created by Illinois and not found in the decision of the Court of Appeals, is the assertion that the Court of Appeals adopted its own effluent limitations. That court did not adopt its own limitations. Having initially determined that the evidence in the record did not support the decision of the District Court with respect to effluent limitations, the Court of Appeals properly proceeded to reverse the determination of the District Court and direct that the judgment below be modifed to impose suspended solids, BOD_5, fecal coliform and free chlorine residual effluent limitations no more stringent than those *prescribed in defendant's discharge permits* issued in accordance with the Federal Water Pollution Control Act.

The Court of Appeals was very careful to make it clear that it was not adopting its own treatment requirements but rather simply deciding that the evidence in the record did not support the District Court's determination. It stated:

> "In short, plaintiffs point to nothing in the record, and we have found nothing to connect the effluent limitations imposed by the District Court with the protection of Illinois residents. If enforcement of the limitations imposed in the discharge permits proves inadequate to protect Illinois residents, then more stringent limitations may become necessary. But on the record before us, we cannot sustain the District Court's order in this respect." App. A-45.

The Court of Appeals decision is based upon a failure of proof, pure and simple. Illinois had a full and adequate opportunity to prove its case in the trial below. The court, after a full analysis of the record below, determined that it had failed to do so.

The Court of Appeals refusal to "cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions" (App. A-46) is based upon specific deficiencies denominated in its opinion (App. A-46 and

47). One of these deficiencies was that the effluent limitations sought to be imposed upon the defendants in this case were markedly lower than those established by the complaining state itself for waters other than Lake Michigan. On this point, the record shows that dischargers in Illinois are generally not affected by the Illinois limitations on discharges to Lake Michigan. The reason is that Illinois dischargers, such as Chicago, discharge (except for certain totally untreated by-passes which do go to Lake Michigan from Chicago and Waukegan on a relatively regular basis) under less severe limitations to other Illinois waters. Illinois never explained the reason for less stringent limitations upon discharges to its waters than those it seeks to impose on Milwaukee 25 to 40 miles away; it did not do so in any previous proceedings. This failure continues in the petition for writ of certiorari. Perhaps the most startling indication of Illinois' duplicitious approach in this case was the action of the Illinois Environmental Protection Agency. On May 10, 1977, during the course of the trial in this action, *without disclosure to the trial court by Illinois,* the Illinois Environmental Protection Agency petitioned the Illinois Pollution Control Board to amend certain water pollution regulations. That petition was accompanied by a statement of the "Justifications" of the Illinois Environmental Protection Agency supporting the petition for amendment. One of the proposed changes dealt with the question of the use of chlorine to disinfect effluents. The Illinois Environmental Protection Agency stated the following:

> "The Agency further proposes to modify the effluent standard for fecal coliform (Rule 405) to require disinfection of effluents only (1) upstream from beaches during the swimming season (May through September); (2) upstream from intakes for public or food processing water supplies (year-round); and (3) to locations where the discharge may cause or contribute to violations of another states' water quality standards in interstate waters (year-round).

> The Agency's proposals are based on its findings and its review of the relevant literature with respect to the need for disinfection of effluents and the cost and environmental impact of chlorination. The Agency will provide testimony at the hearings on this proposal in support of the following points:
>
> 1. Chlorine is not only toxic to aquatic life and a potential health hazard but may also be ineffective in reducing pathogenic organisms.
>
> 2. No technologically feasible and economically reasonable alternatives to chlorination for disinfection presently exist.
>
> 3. *Almost no documented occurrences of illness associated with ingestion of treated (but unchlorinated) sewage have been found by the Illinois Department of Public Health since records have been kept. Nor have such occurrences been reported in the literature.* The Department of Public Health supports the Agency proposal and has stated that it will testify in favor of it at hearing." Illinois EPA Petition for Amendments to the Water Pollution Control Regulations of the Illinois Pollution Control Board, Illinois Pollution Control Board Docket R77-12 (May 10, 1977). (emphasis added)

Another proposed change involved the deletion of the Illinois standard (applicable only to certain low flow by relation to volume of discharge conditions in Illinois waters) which imposes a 4 mg/1 BOD_5 and 5 mg/1 of total suspended solids' effluent limitation. That deletion will free *all* discharges to Illinois intrastate waters from the type of severe limitation sought to be imposed upon Milwaukee here. The justification of the Illinois Environmental Protection Agency for this proposed change is as follows:

> "The Agency proposes that the existing Rule 404(f) be deleted. The standard imposed by that Rule (4 mg/l BOD and 5 mg/l suspended solids) required a level of treatment well beyond the capabilities of conventional tertiary treatment. *Carbon adsorption appears to be the only possible means for compliance and results in extremely high capital and operating costs.*
>
> The Agency will submit evidence at hearing on this proposal to support the following points:
>
> 1. The *prohibitive cost of providing carbon adsorption* has not been reduced since the adoption of Rule 404(f) in 1972. Nor has any other economically reasonable process been developed that can produce effluent quality of 4 mg/l BOD and 5 mg/l suspended solids consistently within the averaging allowances of Rule 404(h)." Id. (emphasis added)

(The trial court here specifically determined that carbon adsorption would not be necessary to meet the 5/5 standard it imposed.) (Tr. pp. 13204-13205; App. F-26)

Thus, it is clear that the effluent standards sought to be imposed upon Milwaukee are not only more stringent than the effluent standards generally applicable in the State of Illinois, but also, during the very course of this trial, the Illinois Environmental Protection Agency proposed changes in the most stringent Illinois regulations applicable only to low flow ratios and based those proposed changes upon the very same principles which the respondents argued to the trial court and the Court of Appeals, *and Illinois did not disclose its real position at trial.*

Illinois' failure to adequately differentiate between the effluent limitations imposed on its own citizens and those sought to be imposed on the defendants unmasks the specious

character of its effluent limitation position in this case and should unmask it on this petition for writ of certiorari.

Illinois' attempt to characterize the claimed error of the Court of Appeals opinion as a failure to apply an appropriate standard of review is another example of a "straw man" argument. The determination by the Court of Appeals that there was a failure of proof does not involve a question on the standard of review.

The Court of Appeals decision recognizes the distinction between a failure of proof and proper deference to a trial court's discretionary determination which is supported by evidence in the record. When the court found that the evidence supported the District Court's determination with respect to overflows it stated:

> "The details of the relief to be granted are in large part left to the trial court's discretion...." App. A-39.

However, where the evidence to support a determination does not exist there is no office for a court's discretionary power to perform. Again, in the words of the Court of Appeals:

> "Nevertheless, a court, unlike a legislature or an administrative agency, is not free to rest solely upon what it thinks desirable; there must be evidence to support its conclusion that the relief granted is necessary to protect the complaining party from harm." App. A-42.

The full record was before the Court of Appeals. All of the evidence relied upon by Illinois was brought specifically to the attention of that court. That court reviewed all proffered evidence and found a void. In so doing, that court performed the classical duty of an appellate tribunal. A record void of evidence to support a lower court determination requires reversal. Reversal was accorded. No standard of review relating to the exercise of a trial court's discretionary power is applicable.

B. Illinois Really Seeks To Try Again After Failing In Its Proof.

Illinois' petition for a writ of certiorari boils down to a plea for another "kick at the cat." This same plea is applicable in every case where a failure of proof is determined on appeal. Every losing party can say, "Let me try again."

No part of the appeal process, including a petition for a writ of certiorari, should be the vehicle to secure a second kick at the cat, an opportunity to patch up a part of the record.

At page 24 of the petition, Illinois cites two cases for the proposition that a remand for the taking of additional evidence is appropriate. *DeMarco v. United States,* 415 U.S. 449 (1974) and *Cordova v. Fox,* 351 F.2d 269 (10th Cir. 1965). The cases cited by Illinois are inapplicable. Those cases deal with the situation where the trial court was never given the opportunity to make findings (*DeMarco*) or where the trial court failed to make findings of fact (*Cordova*).

In this case the District Court made the findings on effluent limitations. The Court of Appeals shouldered the burden of determining that there was no evidence in the record to support the effluent limitations imposed by the District Court, using the mechanism of ordering the parties to submit supplemental memoranda pointing to the evidence relied upon. Consequently, the situation here is that there has simply been a failure of proof after the Court of Appeals has addressed the record below in a searching inquiry. Thus the general rule that a court will not remand to permit new proofs where it would merely be giving the party an opportunity to reopen the case to make his proofs stronger, *Mefford v. Gardner,* 383 F.2d 748, 758 (6th Cir. 1967), becomes directly applicable.

C. Federal Law, Not State Law, Applies To This Case.

The trial court erred in deciding this case under state law, as well as federal common law. The Court of Appeals was correct in refusing to address the state law claims. In *Illinois v. Milwaukee*, 406 U.S. 91, 102 (1972), the Supreme Court stated:

> "[I]t is *federal*, not state, law that in the end controls the pollution of interstate or navigable waters." (emphasis added)

The Supreme Court quoted with approval from *Texas v. Pankey*, 441 F.2d 236, 241-242 (10th Cir. 1971):

> "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims...."[2]

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[2] The Supreme Court pointed out:

> "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law [citations omitted.] Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n.6

Footnote continued on following page

While dictum appearing in a footnote to the decision in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971), might have been argued to support Illinois' claim that its laws can be applied to defendants, that argument is totally refuted by the holding of *Illinois v. Milwaukee*. There the Supreme Court expressly established as the law of this case that federal law must be the law applied and that *Wyandotte* has no office to perform here. (See 406 U.S. at 102 n.3)

(Footnote 2 continued)

See also, *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) where the court stated:

> "The law of the state whose citizens were subject to injuries by the interstate pollution ought not to govern the conduct of citizens and municipalities in another state, while to apply the law of the offending state would be a utilization of the laws of a state whose selfish interest was in the protection of the offenders, herself, her political subdivisions or her citizens. Of necessity, the Court of Appeals for the Tenth Circuit, in 1971, in *Pankey*, and the Supreme Court, in 1972, in *Illinois v. Milwaukee*, turned to a body of federal common law for the resolution of interstate pollution controversies when a state sought extra-territorial relief on behalf of her citizens."

CONCLUSION

The respondents respectfully pray that the Illinois' petition for a Writ of Certiorari be denied.

Respectfully submitted,

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November 2, 1979